SJ SECURITIES SDN BHD

v.

AZMAN MAHMOOD & ANOR

COURT OF APPEAL, PUTRAJAYA
SULAIMAN DAUD JCA
ABDUL WAHAB PATAIL JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: W-02-752-2007]
2 AUGUST 2011

SECURITIES: *Dealer's representative - Shares - Losses in trading account - Whether dealer's representative traded without respondent's prior instruction or knowledge - Whether unauthorised trade can be discovered by account holder - Whether respondent lodged complaint with appellant - Whether appellant had knowledge*

The 1st respondent had opened an account with the appellant, a stockbroking firm, to trade shares, and agreed that one Megat Makhtar, an employee of the appellant, be the dealer's representative and agent to enable the respondents to trade. When the accounts showed outstanding payments that remained unsettled, the appellant sought to obtain payment to cover the outstanding sums in the trading accounts. Thus, the appellant sold part of the 1st respondent's shares to regularise the accounts. When the respondents failed to settle the remaining outstanding amounts, the appellant commenced legal proceedings. In response, the respondents filed a counter-claim against the appellant for damages of manipulating their trade accounts and asserted that Megat Makhtar had himself admitted that the transactions were done without the respondents' instructions. The High Court dismissed the appellant's claim and allowed the respondents' counter-claim. Hence, the appellant appealed to this court against both the dismissal of its claim and the judgment on the counter-claim.

Held (allowing the appeal; setting aside High Court order)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) The agreement between the appellant and the respondent was that the latter would indemnify the appellant against losses in the trading account. There was no evidence that Megat

A Makhtar was other than a dealer's representative who dealt with the respondents on their trades. Although that meant that Megat Makhtar had access to the respondents' trading account with the appellant, and could trade thereon without the respondent's prior instruction or knowledge, records such
B as contract notes and statement of accounts were issued independent of the dealer's representative. It ensured unauthorised trades could not remain hidden, but will be discovered by the account holder. Having discovered evidence of such rogue trades, the account holder was expected to take
C up a complaint with the stockbroking firm. (paras 9 & 13)

(2) The respondents neither informed nor sought the appellant's consent or agreement. It was purely a private arrangement between Megat Makhtar and the respondents allowing Megat
D Makhtar to use the respondents' accounts. The respondents did not take the matter up with the appellant or sought their acknowledgement that the respondents were not liable for losses made by Megat Makhtar. The appellant's contractual rights against the respondents in respect of their trading
E accounts therefore remained unchanged and the appellant continued to have the contractual right to recover losses on the respondent's accounts. (para 14)

[Judgment given for the appellant with costs.]

F ***Bahasa Malaysia*** *Translation Of Headnotes*

Responden pertama telah membuka akaun dengan perayu, sebuah firma broker saham, untuk berdagang saham dan telah bersetuju bahawa seorang Megat Makhtar, pekerja perayu, menjadi wakil
G niaga dan ejen bagi membolehkan responden-responden berniaga. Apabila akaun-akaun menunjukkan terdapat bayaran yang masih belum dijelaskan, perayu telah cuba untuk mendapatkan bayaran bagi menampung jumlah yang masih belum dibayar di dalam akaun dagangan. Oleh itu, perayu telah menjual sebahagian daripada
H saham responden pertama supaya akaun-akaun kembali teratur. Apabila responden gagal untuk menjelaskan baki amaun yang masih belum dibayar, perayu telah memulakan prosiding undang-undang. Sebagai balasan, responden-responden telah memfailkan tuntutan balas terhadap perayu bagi kerosakan memanipulasi akaun
I dagangan mereka dan menegaskan bahawa Megat Makhtar sendiri telah mengakui bahawa transaksi tersebut telah dilakukan tanpa

arahan responden-responden. Mahkamah Tinggi telah menolak tuntutan perayu dan membenarkan tuntutan balas responden-responden. Oleh itu, perayu telah merayu kepada mahkamah ini terhadap penolakan tuntutannya dan penghakiman bagi tuntutan balas.

Diputuskan (membenarkan rayuan dengan kos; mengenepikan perintah Mahkamah Tinggi)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Perjanjian di antara perayu dan responden adalah bahawa responden akan mengganti rugi perayu terhadap kerugian di dalam akaun dagangan. Tiada sebarang bukti bahawa Megat Makhtar adalah selain daripada wakil niaga yang telah berurusan dengan responden-responden berkenaan dagangan mereka. Walau pun ianya bermakna bahawa Megat Makhtar telah mempunyai akses kepada akaun dagangan responden-responden dengan perayu, dan boleh berdagang tanpa arahan awal atau pengetahuan responden-responden, rekod-rekod seperti nota kontrak dan penyata akaun-akaun telah dikeluarkan secara bebas daripada wakil niaga. Ianya telah mengesahkan dagangan tanpa autoriti yang tidak boleh disembunyikan, tetapi akan diketahui oleh pemegang akaun. Dengan adanya bukti bahawa terdapat penipuan dalam dagangan, pemegang akaun adalah dijangka untuk membuat aduan kepada firma broker saham.

(2) Responden-responden tidak memaklumkan atau mendapatkan kebenaran atau perjanjian perayu. Ianya adalah pengurusan peribadi di antara Megat Makhtar dan responden-responden dalam membenarkan Megat Makhtar untuk menggunakan akaun responden-responden. Responden-responden tidak merujuk perkara ini kepada perayu atau mendapatkan pengesahan bahawa responden-responden tidak bersalah bagi kerugian yang dibuat oleh Megat Makhtar. Hak kontrak perayu terhadap responden-responden dalam akaun dagangan kekal tidak berubah dan perayu terus mempunyai hak kontrak untuk membaik pulih kerugian terhadap akaun responden-responden.

[Penghakiman telah diberikan bagi perayu dengan kos.]

A **Case(s) referred to:**

Choo Kok Beng v. Choo Kok Hoe & Ors [1984] 1 LNS 40 PC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd [2009] 6 CLJ 626 CA ***(refd)***

B *Multar Masngud v. Lim Kim Chet & Anor [1982] CLJ 107; [1982] CLJ (Rep) 237 FC* ***(refd)***

For the appellant - Rizal Zulkeply; M/s Rizal & Co

For the respondents - Moh Kok Wai; M/s Moh Kok Wai

C *[Appeal from High Court, Kuala Lumpur; Suit No: D3-22-2432-1998]*

Reported by Kumitha Abdul Majid

D

JUDGMENT

Abdul Wahab Patail JCA:

[1] The appellant SJ Securities Sdn Bhd is a stockbroking firm. The 1st respondent opened an account to trade shares, and
E agreed to one Megat Makhtar, an employee of the appellant, to be the dealer's representative and agent, to enable the respondents to trade.

[2] When the accounts showed outstanding payments that
F remained unsettled, the appellant sought to obtain payment to cover the outstanding sums in the trading accounts. The appellant sold part of the shares belonging to the 1st respondent to regularise the accounts. When the respondents failed to settle remaining outstanding amounts, the appellant commenced legal
G proceedings.

[3] In response, the respondents filed a counter-claim against the appellant for damages for manipulation of the trading accounts, asserting that Megat Makhtar admitted the transactions were done without the respondents' instructions but with the knowledge and
H consent as to a profit sharing scheme proposed by Megat Makhtar as to the profits made in the respondents' accounts due to transactions made without the respondents' instruction.

[4] The High Court dismissed the appellant's claim and allowed
I the respondents' counter-claim. The appellant appealed to this court against both the dismissal of its claim and the judgment on the counter-claim.

The Grounds Of Appeal

[5] The appellant set out as grounds in its Memorandum of Appeal that the learned judge of the High Court erred:

(a) by failing to consider all the material and relevant facts supporting the meritable claim of the appellant before reaching a decision;

(b) in deciding that the appellant's claim be dismissed with costs and allowing the respondents' counter-claim with costs;

(c) in deciding that the losses which occurred in respondents' accounts were not contra losses;

(d) in holding that there were discrepancies in the appellant's contract note for buying and selling shares in the respondents' accounts;

(e) in holding that the share transactions by way of "married deals" in the respondents' accounts are not contra losses and cannot be claimed by the appellant;

(f) in holding that the appellant's witnesses didn't have the knowledge about the manipulation that have occurred in the respondents' accounts;

(g) in holding that the appellant had failed to prove the contra losses that had occurred in the respondents' accounts;

(h) in holding that the share transactions in the respondents' accounts were made without the respondents' consent and instructions;

(i) in holding that the respondents did not have knowledge about their misused accounts by Megat Makhtar;

(j) in failing to consider that there was an arrangement between Megat Makhtar and the respondents about the profit sharing in the respondents' accounts;

(k) when failing to consider that the respondents had failed to make any report to the appellant, police or the security commission even though they have knowledge about the manipulation in their accounts;

(l) when failing to consider that the respondents have knowledge about the share transactions in their accounts when they have received all the contract note, contra statements and through confirmation from Megat Makhtar;

(m) in deciding that the appellant has to return the RM94,650.12 to the respondents as the shares were sold by the Appellant illegally;

(n) in deciding that the appellant has to pay to the respondent RM1,793.20 for B Group dividends, dividends for World Wide Holding Berhad shares and the appellant has to return back all the shares that the appellant is currently holding for the respondents as security for the losses in the respondents' accounts;

(o) in deciding that the respondents are allowed for general damages to be assessed by the Registrar.

Grounds Of Decision

[6] The first two grounds are general introductory statements as to errors asserted and sought to be addressed. As to the other grounds, whether the losses were contra losses, and transactions were married deals are immaterial since the 1st respondent in his application to open a share trading account agreed to indemnify the appellant/plaintiff from all losses. Grounds as to orders to return RM94,650.12, pay back RM1,793.20 for B Group dividends, dividends for World Wide Holding Berhad shares, to return all remaining shares held as security for losses, and whether respondents are entitled to general damages to be assessed are consequential to finding whether the respondents are liable for the trading losses in their trading accounts.

[7] The learned judge of the High Court set out a summary of the case for the plaintiff for breach of term for recovery of losses in trading account, the defendants' defence and counter-claim, the evidence of the four witnesses for the plaintiff, the evidence of the defendants' two witnesses, the submissions for the plaintiff and the submissions for the defendants, before setting out her decision.

[8] The learned judge then considered whether the losses in the respondents' accounts were contra losses and whether the respondents were liable. The learned judge took into consideration

the fact that Ms Janice Koa Kai Wai (SP1) was unable to explain what appeared to be discrepancies in the contract notes and the statement of accounts as to contra trades. The learned judge held that SP1, SP2 and SP3 did not have direct knowledge about the misuse of the trading accounts, and that Megat Makhtar himself had admitted the losses were not contra losses. Based on that, the learned judge concluded that the plaintiff had failed to prove the losses were contra losses.

[9] Although the respondents raised some doubt whether the losses were contra losses, there was no doubt at any stage that there were losses in the trading account. Indeed that there were losses shown on the trading account was not disputed. Megat Makhtar not only did not say there were no losses but admitted there were losses. The learned judge overlooked the fact that whether the losses may be labelled or termed as contra losses or not, is immaterial, since the agreement between the appellant and the respondents is that the latter would indemnify the appellant against losses in the trading account.

[10] The learned judge then turned her attention to the issue whether the losses arose out of trades the respondents cannot be held responsible for. A key part of this issue is the admission of Megat Makhtar (SD1), that he had conducted trades on the respondents' accounts without their instruction or agreement. Another is that SD1 had issued a letter dated 10 January 1997 to the respondents wherein SD1 had undertaken to bear all losses in the respondents' trading accounts. On these facts, the learned judge concluded that the losses arose out of trades by Megat Makhtar and the respondents were not liable.

[11] The evidence before the court is as follows. The 1st respondent opened a trading account on 12 November 1993. A trading account for the 2nd respondent was opened subsequently. The Credit Control Department of the appellant issued a notice dated 10 January 1997 concerning outstanding sums on the respondents' accounts. The 1st respondent met with the Executive Director of the appellant on 24 February 1997 and wrote a letter dated 27 February 1997 to the Executive Director expressing the wish to inform the Executive Director of unauthorized transactions on the respondents' trading accounts. On 12 December 1997, solicitors for the appellant issued legal notices of demand to the respondents. On 13 February 1998,

A solicitors for the respondents wrote to maintain the version that the transactions were unauthorised, and enclosed undated letters by Megat Makhtar and addressed to the Board of Directors of the appellant referring to the legal notices and declaring that the transactions were conducted by him without authority of the B account holders. The undated letters referred to similar statements made to the respondents in his letters dated 10 January 1997 where he undertook to indemnify the respondents. On 20 February 1998, the appellant wrote to Megat Makhtar a show cause letter referring to his admissions. Pursuant to a notice dated C 4 March 1998, a domestic inquiry was held on 9 March 1998 where Megat Makhtar gave his explanations. His services were terminated by a notice of termination dated 22 April 1998. On 25 September 1998, he made two statutory declarations that the losses of RM777,534.73 and RM24,138.43 on the respondents' D accounts arose from unauthorized transactions conducted by him.

[12] Megat Makhtar was called by the respondents as their first witness. He testified that the losses of RM777,534.73 and RM24,138.43 on the 1st and 2nd respondents' trading accounts E respectively were incurred by him without consent or agreement of the respondents. He explained that the difference in the claim of RM846,092.13 and RM26,767.35 arose from interest. He confirmed his statutory declarations of 25 September 1998. He testified as to the transactions he conducted without instruction F of the respondents. Testimony was led that he had made his admissions voluntarily. The conclusion to his testimony for the respondents was as follows:

> 57. Rujuk ms 97, Lampiran 44 (Ekshibit P-41). Anda telah mengatakan semasa Domestic Inquiry bahawa "When the G account was utilised in the first place, it was profitable. This was done with Dato's knowledge". Sila terangkan maksud pernyataan anda ini samada ia telah dilakukan atas arahan Dato' Azman.
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> H A. Saya pohon izin Yang Arif Hakim untuk menerangkannya dalam Bahasa Inggeris. It was done without Dato' Azman's instruction. I bought and sold the shares first in my Clearing Account which resulted in profits. So I approached Dato' Azman and asked him whether I can book the profits under his account, which he agreed. Dato' only knew about this I profitable transaction after the shares have been bought and sold, not before.

58. Seterusnya, anda telah mengatakan semasa Domestic Inquiry bahawa "Subsequently, the account incurred losses, also with Dato's knowledge". Sila terangkan maksud pernyataan anda ini samada ia telah dilakukan atas arahan Dato' Azman.

A. No, it was done without Dato's instruction. The buy and sell of shares in this case have been done and booked into Dato's account without Dato's instruction or knowledge. Dato' knew about this when there were losses in his account and complained to me about it.

59. Rujuk kepada soalan semasa Domestic Inquiry "Does the client know about his own trades and losses in the account?" dan jawapan anda "Yes, up to a certain extent when the losses amounted approximately RM45K." Sila terangkan maksud pernyataan anda ini samada ia telah dilakukan atas arahan Dato' Azman,

A. Yes, Dato' knew about the losses in the account but the transaction was not done with his instruction or approval, Dato' demanded that I rectify the situation.

[13] In the light of the above, we find the argument that Megat Makhtar acted alone without the respondents' instruction or knowledge to be disingenuous. There is no evidence that Megat Makhtar was other than a dealer's representative dealing with the respondents on their trades. Although that meant Megat Makhtar had access to the respondents' trading account with the appellant, and could trade thereon without the respondents' prior instruction or knowledge, records such as contract notes and statement of accounts are issued independent of the dealer's representative. It ensures unauthorised trades cannot remain hidden, but will be discovered by the account holder. Having discovered evidence of such rogue trades, the account holder is expected to take up a complaint with the stockbroking firm.

[14] In this case, Megat Makhtar testified for the respondents, and therefore it is the respondents' own evidence that the respondents agreed that the trades be booked under the respondents' accounts. The arrangement was purely between Megat Makhtar and the respondents. The respondents neither informed the appellant nor sought the appellant's consent or agreement. It was purely a private arrangement therefore between Megat Makhtar and the respondents allowing Megat Makhtar to use the respondents' accounts. It explains why on discovery of

losses, instead of lodging a complaint with the appellant, the 1st respondent went to Megat Makhtar even though the loss was not small. Otherwise it would have been irrational not to have reported immediately to the appellant of the rogue trades, demand removal of the rogue trader and hold the appellant liable for its employee. The respondents did not take the matter up with the appellant or sought the appellant's acknowledgement that the respondents are not liable for losses made by Megat Makhtar. Instead the 1st respondent accepted Megat Makhtar's undertaking to make good the losses. The appellant's contractual rights against the respondents in respect of their trading accounts therefore remained unchanged and the appellant continues to have the contractual right to recover losses on the respondents' accounts.

[15] We would say it is essential for the health and wealth of the stock markets that in respect of those who trade in the stock markets, it is appropriate to draw the inference that they have accepted and ratified rogue trades and trading on their trading accounts if they did not lodge a complaint with whosoever has authority over such trader. We do not think it is rational to complain to the perpetrator alone.

[16] In *Multar Masngud v. Lim Kim Chet & Anor* [1982] CLJ 107; [1982] CLJ (Rep) 237 FC, it was held that an appellate court will interfere and disturb the finding of fact by the trial judge if crucial evidence had been misconstrued resulting in the uncertainty on one party's evidence and the consistency of the other party's evidence being disregarded. In *Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd* [2009] 6 CLJ 626 CA, the Court of Appeal held that where there was no proper evaluation of the evidence by the trial court, this would warrant appellate interference. In *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 1 LNS 40 PC, the Privy Council held that when a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial and in reaching his conclusion has not properly analyzed the entirety of the evidence which was given before him, it is the plain duty of the appellate court to intervene and correct the error lest otherwise the error results in serious injustice. In *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 FC, the Federal Court had this to say:

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention i.e. to determine whether or not the trial court had arrived at its decision

or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase "insufficient judicial appreciation of evidence" merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

[17] Having examined the process of evaluation by the learned trial judge, we find that the learned judge did not fully appreciate the evidence before her. In the event, we allowed the appeal, set aside the order of the High Court and entered judgment for the appellant with costs.